

Matthew M. Childs, P.A.

October 1, 2001

- VIA HAND DELIVERY -

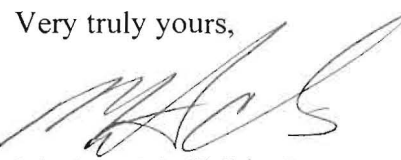
Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, FL 32399

RECEIVED-FPSC
01 OCT - 1 PM 4:47
COMMISSION
CLERK

RE: DOCKET NO. 001148-EI

Dear Ms. Bayó:

Enclosed for filing please find the original and fifteen (15) copies of Florida Power & Light Company's Response to Staff's Motion to Strike Certain Portions of Prefiled Direct Testimony of Korel M. Dubin in the above referenced docket.

Very truly yours,


Matthew M. Childs, P.A.

MMC/gc

Enclosures

cc: All Parties of Record (w/enclosures)
Commissioner Braulio L. Baez, Prehearing Officer


FPSC-BUREAU OF RECORDS

7991

DOCUMENT NUMBER - DATE
1241 OCT-10
FPSC-COMMISSION CLERK

APP
CAF
CMP
COM
CTR
ECR
LEG
OPC
PAI
RGO
SEC
SER
OTI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Florida Power & Light) DOCKET NO. 001148-EI
Company's proposed merger with Entergy)
Corporation, the formation of a Florida)
transmission company ("Florida transco"),) Dated: October 1, 2001
and their effect on FPL's retail rates.)
_____)

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO
STAFF'S MOTION TO STRIKE CERTAIN PORTIONS OF PREFILED
DIRECT TESTIMONY OF KOREL M. DUBIN**

Florida Power & Light Company ("FPL"), hereby respectfully responds to Staff's Motion to Strike Certain Portions of Prefiled Testimony of Korel M. Dubin, and states:

The Testimony Staff Seeks to Strike

The Staff's Motion to Strike goes to a portion of the prefiled testimony of FPL witness Korel M. Dubin. That prefiled testimony was filed and served on August 15, 2001, in support of FPL's position on Issue 4 and describes a proposed procedure to quantify and recover the incremental costs associated with Grid Florida. The procedure addresses filing requirements for presentation to the Commission and the reporting and recording requirements so that the Commission and interested parties can monitor and review the level of costs and cost recovery status. The proposed procedure is similar to that already used for recovery of incremental capacity costs for power purchases and has now been in place for nearly 10 years.

Ms. Dubin's prepared testimony makes it clear that FPL is not seeking cost recovery at this time - therefore, FPL is not presenting costs or cost estimates for consideration by

the Commission for the purpose of establishing rates and charges to be applied to customer bills. Instead, FPL, through Ms. Dubin's prepared testimony is only addressing a proposed adjustment clause procedure modeled on the very procedure the Commission established for capacity charges and now uses on a regular basis.

Summary of Response "What Order No. 1372 Called For"

The Motion's position that the Commission's Order No. 1372 proscribes and prescribes issues regardless of the utility petition's request for relief is simply wrong. More significantly, Staff's Motion to Strike fails to identify or address that FPL has filed and maintained a position on Issue 4 that addresses establishing a cost recovery procedure; that Ms. Dubin's testimony which Staff now seek to strike goes directly to that position; and, that this process of identifying a position and filing testimony in support of its was expressly directed to be the proper procedure for Phase 1. In Order No. 1485 it was stated:

... I believe it is in the best interest of all the parties that the issues remain as broad as reasonably possible, thereby allowing all parties the opportunity to address their issues in the positions taken on the broad issues. The issues as stated below are sufficiently broad as to encompass or subsume all of the issue statements provided by all the parties and allow the individual utilities to present their cases consistent with the Joint Order.

Order No. 1485, at page 3. (emphasis added)

Thus, this was the alternative chosen to having the more specific issues such as FPL's issue on the procedure for cost recovery. Staff's Motion to Strike simply overlooks this express authorization and would treat as unauthorized what has been expressly authorized. FPL would be prejudiced and its rights to due process violated were the Motion to Strike granted.

FPL is sponsoring the prepared testimony of Ms. Dubin on this subject in response to the directions of the Commission at the May 29, 2001, Agenda conference that it file a petition specifying the relief requested and file supporting testimony and exhibits.

Among the Commission's directions to FPL and the other applicants at this Agenda conference was to specify the rulings by the Commission which FPL maintained were necessary to go forward with Grid Florida. FPL's Petition was filed on June 12, 2001 and included an issue which posed how the costs of participation in Grid Florida should be recovered.

On June 27, 2001, after the petition was filed, the Commission issued its Order addressing the rulings and directions at the earlier May 29, 2001, Agenda Conference. (Order No. PSC-01-1372-PCO-EI hereinafter "Order 1372"). Among the statements in that Order that bear on the position now raised by the Staff's Motion to Strike is the direction that the petition should state the relief necessary to proceed to implement Grid Florida and the testimony to be filed supporting that relief should be filed by July 30, 2001.

Order No. 1372, addresses this direction three separate times.

First on page 5 of Order No. 1372 the Commission stated:

"We will not change retail rates or allocate any of the costs or benefits associated with Grid Florida in Phase 1. Each utility will file a petition specifically setting forth the issues it wants the Commission to decide, and the relief it seeks. Each petition should indicate the decisions that the utility believes it needs to proceed forward on the implementation of Grid Florida. The burden is on the utilities". (emphasis added).

FPL does not propose to "change retail rates or allocate costs" through the testimony of Ms. Dubin for Phase 1. Instead, FPL is presenting a proposed methodology.

Second, Order No. 1372, at page 5, again addressed the petitions and testimony associated with Phase 1 stating:

Each utility (FPC, FP&L, and TECO) shall, no later than June 28, 2001, file in the existing docket, a separate petition specifically requesting such affirmative relief with respect to its participation in Grid Florida as it believes appropriate. No later than July 30, 2001, each utility shall file direct testimony and exhibits in support of its petition. The Commission will make a decision on each petition within 90 days of the filing of the utility's direct testimony and exhibits.

Order No. 1372, at pages 5 and 6, (emphasis added).

FPL specifically set forth the issues it wanted decided and the relief necessary for it to go forward with Grid Florida. This was then supported by the direct testimony of Ms. Dubin, among others.

Finally, the "Ordering Paragraph" of Order No. 1372 stated:

"ORDERED that each utility (FPC, FP&L, and TECO) shall, no later than June 28, 2001, file a separate petition, specifically requesting such affirmative relief with respect to its participation in Grid Florida as it believes appropriate. No later the July 30, 2001, each utility shall file direct testimony and exhibits in support of its petition. The Commission will make a decision on each petition within 90 days following the filing of the utility's direct testimony and exhibits.

(Order No. 1372, at page 6, emphasis added).

FPL complied. It filed its petition requesting relief and set forth an issue on the procedure for cost recovery (see, issue (d) set forth in paragraph 15 of the petition). The "Ordering Paragraph" is the Order of the Commission. The Commission set forth the requirements for the petitions and committed to rule within 90 days - that's the Phase 1 ruling. FPL's prefiled testimony is clearly called for under the express rulings of this Commission in Order No. 1372.

The Staff's Motion To Strike - The "Careful Delineation" Argument

The first premise of the Motion's argument that some of Ms. Dubin's testimony should be struck is that Order No. 1372 "carefully delineates the subjects to be handled in Phase 1 and Phase 2 of the Grid Florida docket". This, of course, is not supported by the Order, it raises the obvious question of why the Commission would have been so careful about directing FPL to file a petition specifying the relief necessary to go forward with Grid Florida on an expedited schedule if all along the Commission intended to ignore that petition and decide what the Commission already wanted to decide. FPL does not believe this was the Commission's intent.

Importantly, the Motion does not give the full quote from the Order in discussing this "clear delineation" argument. Instead, Staff uses a partial quote from the Ordering Paragraph of Order No. 1372 to attempt to modify what is stated (in part) in the body of the Order. Thus, what the Motion maintains is that the specific request for affirmative relief that the utilities can appropriately make for Phase 1 is only that which the Staff now says Order No. 1372 "carefully delineates" will be addressed in Phase 1.

The delineation sought by Staff is not in the Order. First, the Ordering Paragraph does not modify the discussion in the Order. Second, the Ordering Paragraph does not purport to make this modification. The full quote from that Ordering Paragraph which is set out in the prior section of this response shows that the relief the petition is to request is the relief the petitioners deems appropriate. Moreover, this same Ordering Paragraph requires that testimony will be filed by the utility and that "... the Commission will make a decision on each petition..." not on what the Motion now says was "clearly delineated".

In addition, the lengthy quote at paragraph 2 of the Motion omits several sentences which FPL believes are directly on point to the question here and compel a different conclusion. Order No.1372 at page 5 in fact said:

Each utility will file a petition specifically setting forth the issues it wants the Commission to decide, and the relief it seeks. Each petition should indicate the decisions that the utility believes it needs to proceed forward on the implementation of Grid Florida. The burden is on the utilities.

(emphasis added).

This language does not support the contention that the Order, not the petition, establishes or “delineates” what will be decided. Instead, the Order clearly directed each utility to file a petition, to specifically set forth the issues it wants the Commission to decide, to specifically set forth the relief it seeks and to indicate the decisions it needs to proceed forward with Grid Florida.

The Motion also asserts that none of the issues established by action of the Prehearing officer in Order No. PSC-01-1485-PCO-EI and issued on July 16, 2001 (hereinafter “Order 1485”) address recovery of costs. (Ms. Dubin’s testimony by addressing a proposed recovery methodology does literally address recovery of costs but, of course, does not propose to change rates). Staff also points out that although FPL proposed an issue on cost recovery in its Petition- this part of the issue offered by FPL “was not adopted”. (See Motion at paragraphs 3 and 4).

The Motion then asserts that in neither the Joint Prehearing Statement nor at the Prehearing Conference on September 17, 2001, did FPL seek to “raise an issue concerning cost recovery”. (Motion at paragraphs 6 and 8).

In summary, the Motion asserts that no issue expressly mentions cost recovery, that FPL's attempt to raise this issue (the Motion acknowledges that it was included in FPL's petition - Motion at paragraph 3) was not successful and that to allow FPL to ignore the Orders Establishing Issues "which establish the scope of this case" would be "contrary to the principles of fundamental fairness and due process". (Motion at paragraphs 11 and 12).

The Motion is wrong. While Order No. 1485 (the "Order Establishing Issues") did not include an issue expressly raising the question of cost recovery, Staff has overlooked that it is not a requirement and that the Order Establishing Issues allowed testimony on positions taken on issues as well as on the issues. Stated differently, the Staff's Motion overlooks what Order No. 1485 said about issues, and testimony and the Commission decision. Thus, the Order states:

... I believe it is in the best interest of all the parties that the issues remain as broad as reasonably possible, thereby allowing all parties the opportunity to address their issues in the positions taken on the broad issues. The issues as stated below are sufficiently broad as to encompass or subsume all of the issue statements provided by all the parties and allow the individual utilities to present their cases consistent with the Joint Order.

Order No. 1485, at page 3 (emphasis added).

Clearly, FPL and all parties were given the authorization to "address their issues in the position taken on the broad issues". That's precisely what FPL did. When it filed its position in its Prehearing Statement ("the Joint Prehearing Statement of Tampa Electric Company, Florida Power Corporation and Florida Power & Light Company, dated September 10, 2001) FPL included the following as its statement of position on what is identified as Issue 4:

FPL: FPL maintains that such incremental GridFlorida transmission charges are properly recoverable through the Capacity Cost Recovery Clause. Explicit approval of recovery of the incremental transmission costs through a Recovery Clause is required for FPL to proceed with an RTO development. (Witness: Dubin).

Therefore, FPL clearly addressed “its issues” in the position it took “on the broad issues”. Moreover, FPL repeated in that statement of position, as pointed out in Order No. 1372, that addressing this issue is required for FPL to proceed with RTO development. Not only did FPL raise this position in its Prehearing Statement addressing Issue 4, this position was also included in the Draft Prehearing Statement that was addressed at the Prehearing Conference held on September 17, 2001. At no time, did the Staff or any party raise a question suggesting that FPL’s position on Issue 4 as it related to proposed cost recovery methodologies was unclear or improperly stated.

Staff’s arguments are absolutely wrong. Order No.1485 expressly finds that all parties may address their issues in the positions taken “on the broad issues” with are set forth in that Order. The Order then continues, as noted, that these broad issues are sufficiently broad as to encompass or subsume “all of the issue statements” provided by “all of the parties” and allow the individual utilities to present their cases consistent with the Joint Order. That ruling by the Prehearing officer did not find that FPL’s issue was improper, instead it found expressly that all issues could be addressed. FPL believes that the effect of the Motion to Strike by the Staff is itself contrary to the Commission Order and would deny at the opportunity to present its case consistent with the Joint Order. As to the Joint Order itself, the Prehearing Officer in Order No. 1485 referenced that Order and concluded that “... the issues [those to be addressed at hearing in Phase I] must be framed to reflect the request being made by the Utilities”. FPL’s request raised this issue on the

methodology for cost recovery. FPL has continued to maintain this issue after the Prehearing Officer ruled in Order No.1485 by following his directions and including its former issue on cost recovery methodology as a position on Issue 4.

In conclusion, FPL submits that the Motion to Strike the testimony of witness Dubin should be denied. First, it is absolutely clear that the action taken by FPL in identifying a cost recovery methodology as part of its position on Issue 4 was expressly authorized by the Prehearing Officer in Order No. 1485. Similarly, the presentation of testimony to address that position on Issue 4 was expressly authorized by the same ruling of the Prehearing Officer. In addition, although it is not necessary to deny the Motion to Strike, in view of the expressed authorization for FPL to act as it did in Order No. 1485, it is clear as well that the Motion's proposed construction of Order No. 1372 is wrong for the reasons set forth herein. And, as the Prehearing Officer observed in Order No. 1485 "... the issues must be framed to reflect the request being made by the Utilities." This is clearly inconsistent with the Motion's construction of clear delineation in the proscription of issues.

Respectfully submitted,

STEEL HECTOR & DAVIS LLP
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301-1804

Attorneys for Florida Power & Light Company

BY: _____


MATTHEW M. CHILDS, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Staff's Motion to Strike Certain Portions of Prefiled Direct Testimony of Korel M. Dubin has been furnished by hand delivery (*), or U.S. mail this 1st day of October, 2001, to the following:

Wm. Cochran Keating IV, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Jack Shreve, Esq.
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Tallahassee, Florida 32399-1400

John W. McWhirter, Jr., Esq.
Attorney for FIPUG
McWhirter, Reeves, McGlothlin,
Davidson, et al.
400 North Tampa Street, Suite 2450
Tampa, Florida 33601-3350

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
Attorneys for FIPUG and Reliant Energy
McWhirter, Reeves, McGlothlin,
Davidson, et al.
117 South Gadsden Street
Tallahassee, Florida 32301

Thomas A. Cloud, Esq.,
Attorney for Dynegy Inc. and Dynegy Midstream Services, LLP
Gray, Harris & Robinson, P.A.
301 East Pine Street, Suite 1400
Post Office Box 3068
Orlando, Florida 32802-3068

Michael B. Twomey, Esq.
Attorney for Thomas P. and
Genevieve E. Twomey
Post Office Box 5256
Tallahassee, Florida 32314-5256

Mark F. Sundback, Esq.
Kenneth L. Wiseman, Esq.
Attorneys for SFHHA
Andrews & Kurth, L.L.P.
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, D.C. 20006

Jon C. Moyle, Jr., Esq.
Cathy M. Sellers, Esq.
Attorneys for CPV Atlantic and PG&E
Moyle, Flanigan, Katz, Raymond &
Sheehan, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301


Diane K. Kiesling, Esq.
Leslie J. Paugh, Esq.
Attorneys for Calpine Corporation, DENA and Mirant
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, Florida 32302

Frederick M. Bryant, Esq.
Attorney for FMPA
2061 - 2 Delta Way
P.O. Box 3209 (32315)
Tallahassee, Florida 32303

Bill L. Bryant, Jr., Esq.
Natalie B. Futch, Esq.
Attorneys for Enron Corporation
Katz, Kutter, Haigler, Alderman, Bryant
& Yon, P.A.
106 East College Ave., 12th Floor
Tallahassee, Florida 32301

Thomas J. Maida, Esq.
Attorney for Seminole Electric Cooperative, Inc.
Foley & Lardner
106 East College Avenue, Suite 900
Tallahassee, Florida 32301

Ronald C. LaFace, Esq.
Seann M. Frazier, Esq.
Attorneys for Publix Super Market, Inc.
Greenberg Traurig, P.A.
101 East College Avenue
P.O. Drawer 1838
Tallahassee, Florida 32302

BY: 
MATTHEW M. CHILDS, P.A.

TAL_1998/40163-1